Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Special Access and Dedicated Transport	)	CCB/CPD File No. 00-20
	)	
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Switched Access	)	CCB/CPD File No. 00-21

COMMENTS IN SUPPORT OF A MORATORIUM ON PRICING FLEXIBILITY PETITIONS PENDING JUDICIAL REVIEW

The Competitive Telecommunications Association ("CompTel") and the Association for Local Telecommunications Services ("ALTS"), by their attorneys, hereby respectfully submit these comments in support of the motion filed by AT&T Corp. ("AT&T") and WorldCom, Inc. ("WorldCom") for a moratorium on all petitions under the Commission's *Pricing Flexibility Order*[1] until sixty days after the final decision on judicial review of that *Order*. As industry associations whose members compete directly against incumbent local

[1] *In re Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (Aug. 27, 1999) ("*Pricing Flexibility Order*" or "*Order*").

exchange carriers ("ILECs") across the country, CompTel and ALTS have a direct interest in this proceeding.

A brief moratorium on pricing flexibility petitions should be adopted in order to avoid the enormous costs that would be incurred by the Commission, carriers, and customers if the Commission grants one or more petitions and then the Court overturns some or all of the *Order* on judicial review. Those costs include not only the time and effort necessary to review the petitions and act upon them, but the complicated problems that would be created if the Commission is forced to "undo" the commercial arrangements entered into between ILECs and customers in the event the Court overturns some or all of the *Order*. In particular, the Commission could face the daunting task of undoing a large number of individual contract tariffs, thereby forcing customers to re-negotiate their interstate access arrangements for the second time in the space of a few months while raising difficult questions about the applicable rates for services provided by ILECs to customers under the vitiated contract tariffs.

Moreover, competitive local exchange carriers ("CLECs") could be subject to significant revenue losses if they lose customers due to these unlawful contract tariffs, which could result in years of litigation at the Commission or in courts. The Commission itself would be forced to conduct accelerated remand proceedings to re-impose lawful interstate access rates in place of the unlawful contract tariffs instituted by the ILECs pursuant to their pricing flexibility petitions. At the same time, the Commission would have to deal with complaints from customers whose access rates were increased by the ILECs during the pendency of the appeals as a means of funding lower prices offered selectively to other customers.

There are no significant factors that militate against a moratorium. Should the Court affirm the Commission's *Order*, petitions for pricing flexibility can be quickly filed and

considered. Because the Court can be expected to act on the appeal relatively quickly, adopting a moratorium would cause at most a modest delay in moving forward with pricing flexibility for the ILECs. Indeed, any delay is likely to be less than the time that already has elapsed between the effective date of the *Order* and the first pricing flexibility petitions. Therefore, prudence dictates that the Commission avoid putting itself, the industry and consumers through the wringer of implementing and then undoing multiple pricing flexibility petitions by granting the moratorium requested by AT&T and WorldCom.

BACKGROUND

On August 27, 1999, the Commission adopted the *Pricing Flexibility Order*, which could result in the nearly complete deregulation of interstate access services offered by dominant, price-cap ILECs throughout all Metropolitan Statistical Areas ("MSAs"). In that *Order*, the Commission afforded price-cap ILECs the opportunity to set rates for interstate access services after demonstrating some competitive entry in an MSA. It is not unreasonable to expect that price-cap ILECs soon will file petitions with the Commission seeking the maximum possible pricing flexibility for their interstate access services.

Taking advantage of the two-phase process articulated by the Commission in its *Order*, many price-cap ILECs may be able to obtain pricing flexibility for a significant number of MSAs in the near future. Upon satisfaction of the "Phase I" triggers for particular services, a price-cap ILEC may enter into contract tariffs and file both contract tariffs and tariffs that offer volume and term discounts on one day's notice. *See Order* ¶ 122. The price-cap ILEC also can obtain complete removal of the price cap and rate structure rules governing special access services throughout a particular MSA in "Phase II" and may file tariffs on a day's notice. *See id.* ¶ 153. Thus, upon receiving Phase II relief, the Commission will regulate the ILEC as it does

traditional, nondominant competitive carriers with the only additional requirement that the price-cap ILEC continue to file tariffs.

AT&T, WorldCom and Time Warner Telecom Inc. petitioned for review of the *Order* in the U.S. Court of Appeals for the District of Columbia Circuit. *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395 *et al.* (D.C. Cir.). CompTel and ALTS are participating in these appeals as intervenors. As AT&T and WorldCom explain in their motion, "AT&T and WorldCom did not seek a stay of the *Order* pending judicial review as an initial matter, largely because there was no pending pricing flexibility petition at that time." *Motion of AT&T Corp. and WorldCom, Inc. for a Moratorium on Pricing Flexibility Petitions Pending Judicial Review*, CC Docket Nos. 96-262, 94-1, CCB/CPD File Nos. 98-63, 00-20, 00-21, at 4 n.4 (Sept. 8, 2000). The case is now fully briefed by the parties and oral argument is set for November 30, 2000. A final decision can reasonably be expected within a few months after the oral argument.

BellSouth filed a petition for pricing flexibility for switched access service and another petition for special access pricing flexibility shortly after the close of the briefing schedule in the D.C. Circuit.[2] With its petition for pricing flexibility for special access, BellSouth seeks Phase II relief – removal of all price cap and rate structure rules – in each of the nine states in its region. With its petition for pricing flexibility for switched access service, BellSouth seeks Phase I relief – the ability to enter into contract tariff – in 10 MSAs. Should the Commission grant the petitions, BellSouth presumably will seek to move rapidly to negotiate

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2 *BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility For Special Access and Dedicated Transport Services*, CCB/CPD File No. 00-20; *BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Switched Access*, CCB/CPD File No. 00-21.

contract tariffs with a significant number of customers who now take service pursuant to BellSouth's tariffs or who currently have contractual or tariff-based arrangements with CLECs.

ARGUMENT

CompTel and ALTS urge the Commission to adopt a moratorium on all pricing flexibility petitions under the *Pricing Flexibility Order* until sixty days after the D.C. Circuit's final decision on judicial review of that *Order*. Such a moratorium is necessary considering the sea-change effect of the Commission's *Order*, which could remove all rate regulation of the ILECs' switched and special access services in numerous markets in which, as even the Commission concedes, the ILECs continue to have market power over access services. By granting BellSouth's petitions, and the petitions filed by other ILECs, the Commission could spur massive and immediate efforts to persuade a large number of access customers to replace their current arrangements with individually-negotiated access contracts with the ILECs. This upheaval in the access world would be difficult and costly to "unscramble" in the event the Court overturns all or some of the *Order*..

If price-cap LECs are awarded pricing flexibility and the court subsequently vacates – even in part – the Commission's *Order*, the effort of the Commission and carriers to review the petitions will have been largely wasted. Further, given the need to preserve their legal positions while the appeals are pending, many carriers will have initiated litigation to challenge Commission decisions granting these pricing flexibility petitions. These costs are unnecessary should the Court reverse the Commission's decision, and they can be avoided through the targeted moratorium requested by AT&T and WorldCom.

It should be noted that the ability of interested parties to comment on individual pricing flexibility petitions is complicated by the Commission's tight briefing schedule and the

confidential treatment of supporting submissions of the ILECs, which makes it difficult for CompTel, ALTS or other interested entities to thoroughly examine each petitioner's data. At the very least, it is a process the parties should be spared from enduring twice – once during the pendency of the appeal of the *Pricing Flexibility Order* and, again, upon the court's disposition.

Further, a Court reversal could force the Commission to undo a significant number of contract tariffs entered into during the brief time of the court's review. Certainly, it will be costly for the Commission and the industry – to say nothing of the customers involved – if the Commission must undo a large number of individually-negotiated arrangements throughout the country. In addition, the Commission will have to conduct accelerated remand proceedings to re-establish lawful ILEC access tariffs, while parties will be faced with years of litigation to sort out the rights and obligations of various parties with respect to the contract arrangements that were put in place, or shoved aside, during the period after the ILECs received pricing flexibility but before the Court overturned the underlying agency regime.

In addition, customers who entered into contract tariffs with the ILECs while the appeals are pending will be harmed because their access rates (and hence their underlying costs) will be uncertain, they will be dragged into regulatory and judicial proceedings, and they could be forced to re-negotiate their access arrangements for the second time in a few months due to the Court decision. Conversely, other customers who are dependent on the ILECs' current tariffed services, and who are not offered lower-priced contract tariffs by the ILECs pursuant to pricing flexibility, may face higher rates as the ILECs increase their standard tariffed rates to pay for the discounted contract tariffs they will be negotiating. To say the least, it will be difficult for the Commission to restore those customers to the positions they would have occupied had the ILECs not moved forward with pricing flexibility while the appeals were pending. A moratorium

would spare the Commission and private parties the enormous expense and aggravation of seeking to "unscramble" the pricing flexibility egg.

By comparison, the costs of the requested moratorium are quite small. In the event the *Order* is affirmed, pricing flexibility petitions could be quickly filed and considered. Further, the Commission can reasonably expect that the Court will issue a final decision on the appeals in a few months, so the delay caused by the moratorium should be relatively modest.

The Commission has clear authority to modify the procedure of the petition process and adopt such a moratorium. Similar moratoriums have been upheld, particularly if a moratorium – or "freeze" – is consistent with the agency's broader mandate to adopt regulatory structures consistent with the public's interest, convenience and necessity. *See, e.g., Neighborhood TV Co., Inc. v. FCC*, 742 F.2d 629, 634-40 (D.C. Cir. 1984); *Kessler v. FCC*, 326 F.2d 673, 679-85 (D.C. Cir, 1963); *Mesa Microwave, Inc. v. FCC*, 262 F.2d 723, 725 (D.C. Cir. 1958). The Commission therefore has the authority and should in this case adopt a brief moratorium.

CONCLUSION

For the foregoing reasons, CompTel and ALTS support a moratorium on pricing flexibility petitions under the Commission's *Pricing Flexibility* and urge the FCC to order a moratorium on all petitions under the Commission's *Pricing Flexibility Order* pending judicial review of that *Order*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Joseph Price, do hereby certify that on this 15th day of September 2000, a copy of the foregoing Comments in Support of a Moratorium on Pricing Flexibility Petitions Pending Judicial Review was served by facsimile, U.S. first class mail, postage prepaid or hand delivery, on the parties listed below.

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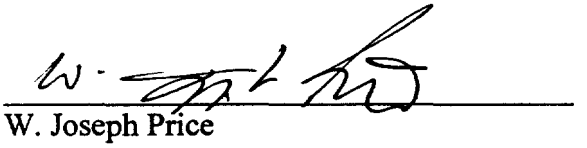

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